

BEFORE THE
BOARD OF REGISTERED NURSING
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JENNIFER LYNN LEISURE

Respondent.

Case No. 2008-31

OAH No. L2007110037

DECISION AFTER NON-ADOPTION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 28, 2008, in Los Angeles, California. Nicholas A. Sanchez, Deputy Attorney General, represented complainant Ruth Ann Terry, M.P.H., RN, Executive Officer of the Board of Registered Nursing (Board), Department of Consumer Affairs, State of California. Respondent Jennifer Lynn Leisure represented herself and was present throughout the hearing. The matter was submitted on February 28, 2008.

On April 15, 2008, the Administrative Law Judge's Proposed Decision was received by the Board. Thereafter, the board declined to adopt said Proposed Decision and issued a Notice of Non-Adoption of Proposed Decision dated June 17, 2008. The time for filing written argument in this matter having expired, written argument having been filed by both parties and such written argument, together with the entire record, including the transcript of said hearing, having been read and considered, pursuant to Government Code Section 11517, the Board hereby makes the following decision and order:

The attached decision of the Administrative Law Judge dated April 1, 2008, is hereby adopted as if fully set forth.

This Decision shall become effective on **October 24, 2008.**

IT IS SO ORDERED this **24th** day of **September**, 2008.

LaTranene W Tate

Board of Registered Nursing
Department of Consumer Affairs
State of California

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Case No. 2008-31

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PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on February 28, 2008, at Los Angeles, California.

Nicholas A. Sanchez, Deputy Attorney General, represented Complainant.

Jennifer Lynn Leisure (Respondent) represented herself.

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

FINDINGS OF FACT

1. Ruth Ann Terry, M.P.H., R.N., made the Accusation in her official capacity as the Executive Officer of the Board of Registered Nursing (Board).

2. Respondent is a registered nurse, having been licensed by the Board on August 6, 2002, license number 603744. The license expired on October 31, 2007. Respondent did not renew her license because she believed she could not do so while these disciplinary proceedings were pending. She has not worked as a nurse in California since prior to the expiration of her license.

3. On October 3, 2006, in the Superior Court of the State of California, County of Los Angeles, Southwest Judicial District, Respondent was convicted, after a jury trial, of one count of violating Vehicle Code section 23152, subdivision (a), driving under the influence of alcohol, a misdemeanor.

Respondent was ordered to serve 90 days in the County Jail, with credit for three days served. Respondent was not required to serve the remaining 87 days of the sentence. Respondent was not placed on probation. Respondent was ordered to pay fines and fees totaling \$1,230. Respondent was also ordered to pay \$100 for restitution. The court did not require Respondent to attend any alcohol rehabilitation program.

The facts and circumstances of the crime are that on March 11, 2006, in the early evening, Respondent was the driver at fault in a rear-end collision with another vehicle. Prior to the accident, Respondent had had dinner with friends at a local restaurant. She drank wine with dinner. The investigating officer smelled alcohol on Respondent's breath and, after giving her standard field sobriety tests (heel-toe walk, nose touch and the like) determined that she was under the influence of alcohol. Respondent attempted, twice, to use a breathalyzer, but the instrument did not register. Respondent volunteered to have blood drawn, but her offer was never acted upon.

4. After her conviction, Respondent's driver's license was automatically suspended, and she was required by the Department of Motor Vehicles to enroll in and complete a 90-day First Offender Drinking Driver Program. Respondent successfully completed that program, including her attendance at six Alcoholics Anonymous meetings and 30 hours of classroom work and group discussions. As of the evening she was arrested, Respondent has not consumed any alcoholic beverages of any kind, except in one instance where she shared in a champagne toast at her brother's wedding.

5. Respondent is a 2000 graduate of the University of Indiana School of Nursing. In addition to her R.N. degree, Respondent also earned a Bachelor of Science in Nursing from that school. Respondent has been a traveling nurse since 2002. She spends nine months per year working in California and three months per year working in her native Indiana so she can be near her family (parents, two brothers, two nieces, and Respondent's boyfriend.)

6. Respondent proactively notified the Indiana State Nursing Board of her California conviction. She appeared before that board on November 13, 2007; her Indiana license was renewed without restriction of any kind, but she was required to be assessed by the Indiana State Nurses Assistance Program (ISNAP), the functional equivalent of this Board's Diversion Program. After reviewing her work history, reference letters,¹ evaluation by a Licensed Marriage and Family Therapist who was also a Certified Alcohol and Drug Abuse Counselor,² and clean drug screen, ISNAP found that Respondent "does not currently meet criteria for monitoring with the ISNAP program."

7. In 2006, the Board offered to allow Respondent to enroll in its Diversion Program. Respondent declined that opportunity, because Respondent believed that, under the terms of the Diversion Program agreement, she could not work in Indiana and still comply with the terms requiring her presence and monitoring in California. Respondent did not want to enter into an agreement she believed she was destined to fail, even for the expediency of having no discipline imposed on her California license.

¹ Respondent's current supervisor, the Emergency Department Manager of Saint John's Health System in Anderson, Indiana, wrote to ISNAP that "[Respondent] is a dependable and reliable associate and has met or exceeded all past and present performance standards. I have not had concerns regarding substance abuse."

² According to the ISNAP report, the therapist diagnosed Respondent with "alcohol abuse in sustained remission" and opined that "no treatment was needed."

8. At all times during the hearing of this matter, Respondent showed great respect for the Board and these proceedings. She also demonstrated, through her heartfelt testimony and documentary evidence from her employers, that she deeply regretted the incident in question, that she accepted full responsibility therefore, and that she truly is a good nurse.³ She did not attempt to palliate or vitiate her conduct. Respondent testified consistently with a letter she wrote to the Board on October 19, 2007, that reads, in part:

My [conviction] for driving under the influence of alcohol was a terrible error in judgment. Acknowledging my failure to the nursing profession is an important step for me because I am extremely remorseful for my careless actions. I attended a three month rehabilitation program and mandatory [A]lcoholics [A]nonymous sessions. These actions inspired my personal forgiveness and encouraged me to seek forgiveness from others. I deeply apologize for not upholding my professional dignity as a registered nurse. This one event does not define who I am as a person, and certainly, not as a loving caregiver.

[¶] . . . [¶]

Enduring these repercussions [from my conviction] causes me tremendous heartache and self disappointment. I offer the board my sincerest apology for my inappropriate conduct. This awful DUI [conviction] does not accurately reflect who I am. Please let me reassure the entire community that there will be no more shortcomings in my actions. I have aligned my life in accordance with my core moral values. With every cell of my being, I pledge my commitment to the vital importance of following the nursing practice act.

9. In addition to working full time and spending leisure time with her family, Respondent volunteers 30 hours per month with "Imerman Angels." According to its website, "Imerman Angels is a 'one-on-one cancer support service' that partners a person fighting cancer ('fighter') with someone who's beaten the same type of cancer ('survivor'). One-on-one relationships give a fighter the chance to ask personal questions and get support from someone who is uniquely familiar - a survivor." Respondent works with the outreach director to help cancer "fighters" and cancer "survivors" make contact. Respondent has been a volunteer with Imerman's Angels since May 2007.

10. The Board reasonably incurred costs, including fees of the Attorney General, in connection with the investigation and prosecution of this matter, in the sum of \$2,979.

* * * * *

³ Respondent's last performance review, from Saint John's Health System, covering the period August 2006 to August 2007, is filled with glowing accolades regarding Respondent's performance. Typical of the comments contained in the evaluation is the following: "[Respondent] demonstrates a mature level of skill as an RN in the Emergency Department. She is able to anticipate problems in the early stages and take positive steps to prevent serious developments. [Her] work displays an outstanding level of quality. She has excellent customer relation skills and displays a high priority in serving patients and their families with care, courtesy and efficiency."

CONCLUSIONS OF LAW

1. The Board has authority to discipline a nurse's license under Business and Professions Code sections 490, 2750, and 2761, subdivision (f), based on a criminal conviction, so long as the crime is substantially related to the functions, duties and qualifications of the Board licensee. California Code of Regulations (CCR), title 16, section 1444, sets forth the criteria of substantial relationship. It states, in relevant part:

A conviction or act shall be considered to be substantially related to the qualifications, functions or duties of a registered nurse if to a substantial degree it evidences the present or potential unfitness of a registered nurse to practice in a manner consistent with the public health, safety, or welfare.

The conviction set forth in Finding 3 is substantially related to the functions, duties and qualifications of a Board licensee. Thus, Respondent's license is subject to discipline.

2. The Board has authority to discipline a license for unprofessional conduct under Business and Professions Code sections 2750 and 2761, subdivision (a). Section 2762, subdivision (b) provides that it is unprofessional conduct to:

Use any controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug or dangerous device as defined in Section 4022, or alcoholic beverages, to an extent or in a manner dangerous or injurious to himself or herself, any other person, or the public or to the extent that such use impairs his or her ability to conduct with safety to the public the practice authorized by his or her license.

Thus, Respondent's license is subject to discipline under these code sections as well, based on the conduct described in Finding 3.

3. While it is easy to conclude that Respondent's license is subject to discipline, the severity of that discipline is much more difficult to determine, given the unique facts of this case. No decision by the California Courts could be found where imposition of license discipline was imposed at all, by any state agency, based on a single conviction of violating Vehicle Code section 23152. Every case in which discipline was imposed by an agency and affirmed by the courts involved multiple convictions for violating laws relating to driving while intoxicated. The courts have consistently found that is the recidivist nature of the conduct which puts the public at risk. See, *People v. Forster* (1994) 29 Cal. App. 4th 1746.

4. In *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, the Court addressed the issue of whether a substantial relationship exists between the use of alcohol (in that case, two alcohol-related convictions) and the qualifications, functions and duties of a physician. The analogy to the allied health professions is readily apparent in the Court's analysis. The Court stated, commencing at page 770:

Convictions involving alcohol consumption reflect a lack of sound professional and personal judgment that is relevant to a physician's fitness and competence to practice medicine. Alcohol consumption quickly affects normal driving ability, and driving under the influence of alcohol threatens personal safety and places the safety of the public in jeopardy. It further shows a disregard of medical knowledge concerning the effects of alcohol on vision, reaction time, motor skills, judgment, coordination and memory, and the ability to judge speed, dimensions, and distance. (Citation.)

Driving while under the influence of alcohol also shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a serious breach of a duty owed to society. . . . Knowledge of such repeated conduct by a physician, and particularly of its propensity to endanger members of the public, tends to undermine public confidence in and respect for the medical profession. (Citation.) Repeated convictions involving alcohol use, two of which violated Griffiths's [*sic*] probation, undermine public confidence in and respect for the medical profession.

¶ . . . ¶

In re Kelley, *supra*, 52 Cal.3d 487 relies on this premise and provides controlling authority in this case. In *Kelley*, an attorney was disciplined for professional misconduct consisting of two convictions for violating Vehicle Code section 23152, former subdivision (b) (driving with a blood-alcohol level exceeding 0.10 percent). The disciplined attorney called witnesses who testified that the attorney's misconduct did not harm clients or interfere with the attorney's legal practice. *Kelley* held that the lack of such adverse impact did not preclude the imposition of discipline. (52 Cal.3d at pp.495-496.) Moreover, multiple drinking and driving convictions created a potential for harm to clients that warranted license discipline before actual harm to clients occurred. The protection of the public, the primary purpose of licensing statutes, does not require harm to a client before licensing discipline can take place. "[R]epeated criminal conduct, and the circumstances surrounding it, are indications of alcohol abuse that is adversely affecting petitioner's private life. We cannot and should not sit back and wait until petitioner's alcohol abuse problem begins to affect her practice of law." (*Id.* at p. 495.)

Although *Kelley* involved an attorney, we believe its conclusion applies with equal or greater force to a physician's practice of medicine. Griffiths's [*sic*] three alcohol-related convictions are indications of alcohol abuse that affects his private life. We need not wait until his alcohol abuse problem begins to affect his practice of medicine.

5. Under the Board's disciplinary guidelines, an Administrative Law Judge is asked to consider the following factors to be considered when determining the appropriate level of discipline:

1. Nature and severity of the act(s), offenses, or crime(s) under consideration.
2. Actual or potential harm to the public.
3. Actual or potential harm to any patient.
4. Prior disciplinary record.
5. Number and/or variety of current violations.
6. Mitigation evidence.
7. Rehabilitation evidence.
8. In case of a criminal conviction, compliance with conditions of sentence and/or court-ordered probation.
9. Overall criminal record.
10. Time passed since the act(s) or offense(s) occurred.
11. If applicable, evidence of expungement proceedings pursuant to Penal Code Section 1203.4.

6. In evaluating the above factors, one is first struck by the extraordinary leniency of Respondent's sentence. Respondent served three days in jail only. The court did not place her on probation nor did it require her to enroll in any recovery program (although she did attend a program through the Department of Motor Vehicles. Respondent was convicted after a jury trial, meaning that, in handing down its sentence, the court had had the opportunity to review in detail the facts and circumstances surrounding Respondent's case. After having taken that opportunity, the court determined that Respondent was not in need of any oversight by the criminal justice system nor in need of being ordered into a rehabilitation facility. This is consistent with the findings of ISNAP. In looking at the other factors delineated above, it is clear Respondent caused no patient harm, has no prior disciplinary record, has an outstanding record of rehabilitation (discussed below), albeit for a relatively short period of time (two years), and has no other criminal history.

7. Before the final determination of the level of discipline that is to be imposed, the Administrative Law Judge is required to consider evidence of rehabilitation. The Board's disciplinary guidelines contemplate careful consideration of the "totality of facts and circumstances in each individual case" and permit deviation from the recommended discipline for sufficient reason. Any downward departure, however, must address the Board's paramount concern for public safety.

8. The guidelines recommend that Respondent be placed on probation for a period of three years under very restrictive conditions, conditions which are not necessary given the facts of this case. It is not necessary to place Respondent on formal probation to ensure the public will not be put at risk through Respondent's continued licensure. As set forth in Findings 6 through 9, the State of Indiana, after careful evaluation, has determined that Respondent is not in need of any type of continuing rehabilitative efforts. Respondent has a

stellar work history. Her employers know of her conviction, yet have expressed no concern that Respondent is likely to re-offend. Respondent has a stable family life and volunteers a significant amount of her time to charitable causes.

9. Most importantly, Respondent has the requisite mental state that establishes rehabilitation and thus the likelihood that the public safety will not be put at risk by her continued licensure. Remorse for one's conduct and the acceptance of responsibility are the cornerstones of rehabilitation. Rehabilitation is a "state of mind" and the law looks with favor upon rewarding with the opportunity to serve one who has achieved "reformation and regeneration." *Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058. Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940. Mere remorse does not demonstrate rehabilitation. A truer indication of rehabilitation is sustained conduct over an extended period of time. *In re Menna* (1995) 11 Cal.4th 975, 991. The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. *Kwasnik v. State Bar* (1990) Cal.3d 1061, 1070.

10. The Board is entitled to recover from Respondent its costs, including fees of the Attorney General, that it has incurred in connection with the prosecution of this matter, under the provisions of Business and Professions Code section 125.3. The Board has reasonably incurred costs in the sum of \$2,979, by reason of Finding 10.

11. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court held that the imposition of costs for investigation and enforcement under California Code of Regulations, title 16, section 317.5, (relating to chiropractors) did not violate due process. Since regulation 317.5 and Business and Professions Code section 125.3 have substantially the same language and seek the same sort of cost recovery, it is reasonable to extend the reasoning in *Zuckerman* to section 125.3. The court held that it was incumbent on the Board to exercise its discretion to reduce or eliminate cost awards in a manner that ensured section 317.5 did not deter licensees with potentially meritorious claims or defenses from exercising their right to a hearing. The *Zuckerman* court set forth four factors that the Board was required to consider when deciding whether to reduce or eliminate costs. These were: (1) whether the licensee used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed; (2) whether the licensee had a "subjective" good faith belief in the merits of his position; (3) whether the licensee raised a "colorable challenge" to the proposed discipline; and (4) whether the licensee has the financial ability to make payments.

12. In this matter, Respondent's rehabilitation and mitigation evidence resulted in a reduction in the minimum recommended discipline. It is therefor reasonable to reduce the costs she must have to pay. It is found that \$1,500 is a reasonable amount to require Respondent to pay to the Board for its cost recovery.

13. Business and Professions Code section 495 provides, in pertinent part, "Notwithstanding any other provision of law, any entity authorized to issue a license or

certificate pursuant to this code may publicly reprove a licentiate or certificate holder thereof, for any act that would constitute grounds to suspend or revoke a license or certificate." In light of all the foregoing, it is found that the below Order, reproving Respondent and placing appropriate conditions on the reproof, will adequately provide for the public health, safety and welfare while allowing Respondent to continue her nursing practice in California.

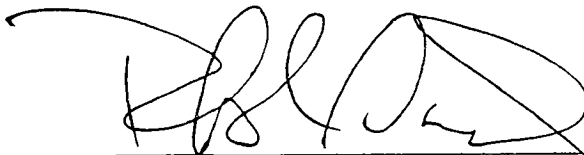
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ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Respondent Jennifer Lynn Leisure is hereby reproofed within the meaning of Business and Professions Code section 495.
2. As a condition of this reproof, Respondent shall pay to the Board all past due licensing fees. Upon reinstatement of her license, Respondent shall, for a period of 24 months from the effective date of this Decision, completely abstain from the possession, injection or consumption by any route of all controlled substances and psychotropic (mood altering) drugs, including alcohol, except when the same are ordered by a health care professional legally authorized to do so as part of the documented medical treatment. Respondent, at her expense, shall participate in a random, biological fluid testing or drug screening program approved by the Board. Any confirmed finding shall be reported immediately to the Board by the program, and Respondent shall be considered in violation of the terms of this reproof.
3. The 24-month period shall be tolled if and when Respondent resides or travels outside of California for longer than two weeks. Respondent must provide written notice to the Board within 15 days of any change of residency or practice outside of this state, and within 30 days prior to re-establishing residency or returning to practice in this state.
4. Respondent shall pay to the Board the sum of \$1,500 at such time and in such manner as the Board, in its discretion, may direct.

Date: 4-1-08



RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

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8 **BEFORE THE**
9 **BOARD OF REGISTERED NURSING**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 2008-31

13 JENNIFER LYNN LEISURE
2704 North A Street
Elwood, IN 46036

ACCUSATION

14 Registered Nurse License No. 603744

15 Respondent.

16
17 Complainant alleges:

18 **PARTIES**

19 1. Ruth Ann Terry, M.P.H, R.N (Complainant) brings this Accusation solely
20 in her official capacity as the Executive Officer of the Board of Registered Nursing (Board),
21 Department of Consumer Affairs.

22 2. On or about August 6, 2002, the Board issued Registered Nurse License
23 No. 603744 to Jennifer Lynn Leisure (Respondent). The Registered Nurse License was in full
24 force and effect at all times relevant to the charges brought herein and will expire on December
25 31, 2007, unless renewed.

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1 7. Section 2762 of the Code states:

2 "In addition to other acts constituting unprofessional conduct within the meaning
3 of this chapter [the Nursing Practice Act], it is unprofessional conduct for a person licensed
4 under this chapter to do any of the following:

5

6 "(b) Use any controlled substance as defined in Division 10 (commencing with
7 Section 11000) of the Health and Safety Code, or any dangerous drug or dangerous device as
8 defined in Section 4022, or alcoholic beverages, to an extent or in a manner dangerous or
9 injurious to himself or herself, any other person, or the public or to the extent that such use
10 impairs his or her ability to conduct with safety to the public the practice authorized by his or her
11 license.

12 "(c) Be convicted of a criminal offense involving the prescription, consumption,
13 or self-administration of any of the substances described in subdivisions (a) and (b) of this
14 section, or the possession of, or falsification of a record pertaining to, the substances described in
15 subdivision (a) of this section, in which event the record of the conviction is conclusive evidence
16 thereof.

17 "(d) Be committed or confined by a court of competent jurisdiction for
18 intemperate use of or addiction to the use of any of the substances described in subdivisions (a)
19 and (b) of this section, in which event the court order of commitment or confinement is prima
20 facie evidence of such commitment or confinement."

21 8. Section 2764 of the Code provides, in pertinent part, that the expiration of
22 a license shall not deprive the Board of jurisdiction to proceed with a disciplinary proceeding
23 against the licensee or to render a decision imposing discipline on the license. Under section
24 2811(b) of the Code, the Board may renew an expired license at any time within eight years after
25 the expiration.

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28 ///

9. California Code of Regulations, title 16, section 1444 states:

“A conviction or act shall be considered to be substantially related to the qualifications, functions or duties of a registered nurse if to a substantial degree it evidences the present or potential unfitness of a registered nurse to practice in a manner consistent with the public health, safety, or welfare.”

10. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

FIRST CAUSE FOR DISCIPLINE

(Conviction of Substantially Related Crime)

11. Respondent is subject to disciplinary action under sections 2761, subdivision (f), and 490 of the Code, on the grounds of unprofessional conduct, as defined in California Code of Regulation, title 16, section 1444, in that Respondent was convicted of a crime which is substantially related to the qualifications, functions and duties of a licensed registered nurse, as follows:

a. On or about October 3, 2006, in a criminal proceeding entitled *The People of the State of California v. Jennifer Leisure*, Respondent was convicted by a jury for violating Vehicle Code section 23152(a) (driving under the influence of an alcoholic beverage), a misdemeanor, in the Superior Court of the State of California, County of Los Angeles, Torrance Judicial District, Case No. 6SY01928.

b. The circumstances surrounding the conviction are that on or about March 11, 2006, Respondent willfully and unlawfully, while under the influence of an alcoholic beverage or drug, drove a motor vehicle, and rear ended another vehicle.

SECOND CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Use of Alcohol)

12. Respondent's Registered Nursing license is subject to disciplinary action under section 2761, subdivision (a), of the Code, on the ground of unprofessional conduct, as

1 defined in section 2762, subdivision (b), in that on or about March 11, 2006, Respondent used
2 alcohol to an extent or in a manner dangerous or injurious to herself, any other person, or the
3 public, as set forth in paragraph 11 above.

4 THIRD CAUSE FOR DISCIPLINE

5 (Conviction of a Criminal Offense Involving the Consumption of Alcohol)

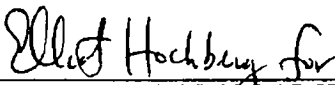
6 13. Respondent is subject to disciplinary action under section 2761,
7 subdivision (a), of the Code, on the ground of unprofessional conduct, as defined in section 2762,
8 subdivision (c), in that on or about March 11, 2006, Respondent was convicted of a crime
9 involving the consumption of alcohol, as set forth in paragraph 11 above.

10 PRAYER

11 WHEREFORE, Complainant requests that a hearing be held on the matters herein
12 alleged, and that following the hearing, the Board issue a decision:

- 13 1. Revoking or suspending Registered Nurse License No. 603744, issued to
14 Jennifer Lynn Leisure;
15 2. Ordering Jennifer Lynn Leisure to pay the Board the reasonable costs of
16 the investigation and enforcement of this case, pursuant to Business and Professions Code
17 section 125.3;
18 3. Taking such other and further action as deemed necessary and proper.

19
20 DATED: 7/31/07

21
22 
23 RUTH ANN TERRY M.P.H., R.N.
24 Executive Officer
25 Board of Registered Nursing
26 State of California
27 Complainant